

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re  
BRUCE MICHAEL KELLOGG,  
Debtor.

Case No. 93-54288-MM  
Chapter 7

DAVID R. BEHLING,  
Plaintiff,  
vs.

Adversary No. 93-5503

BRUCE MICHAEL KELLOGG,  
Defendant.

**MEMORANDUM OPINION AND  
ORDER THEREON**

**INTRODUCTION**

The matter before the Court is the defendant's motion to dismiss the case for failure to state a claim upon which relief can be granted, or in the alternative, for a more definite statement. For the reasons set forth as follows, the motion to dismiss is denied, and the motion for a more definite statement is granted.

**FACTS**

Bruce Kellogg filed a chapter 7 petition on July 2, 1993. David Behling, as trustee for the Mowry Starker Trust, filed a complaint against the debtor on October 4, 1993 to determine dischargeability of debt. Behling's complaint is based on a default judgment for fraud entered against

1 the debtor on May 16, 1984 by the Superior Court for San Mateo County. The state court judgment  
2 is in the total amount of \$88,574, which includes principal of \$42,000, interest of \$18,313, attorneys'  
3 fees and costs of \$2,141, and punitive damages of \$26,120.

4 Although the adversary proceeding cover sheet sets forth that the plaintiff's claim is an  
5 objection to discharge pursuant to 11 U.S.C. § 727 on grounds of fraud, the complaint does not rely  
6 on section 727. The complaint sets forth that the plaintiff is entitled to relief under 11 U.S.C. § 523,  
7 but it fails to specify the subsection under which the claim arose. The complaint also fails to set forth  
8 the factual circumstances, including the place, time or manner in which the claim arose. The default  
9 judgment is attached as an exhibit to the adversary complaint, but the basis of the plaintiff's claim is  
10 unclear from the face of the default judgment. The plaintiff has not furnished the Court with a copy  
11 of the complaint that was filed in the Superior Court.

12 The plaintiff argues that it is entitled to a judgment of nondischargeability based on the  
13 preclusive effect of the Superior Court default judgment for fraud and on the full faith and credit  
14 provision of 28 U.S.C. § 1738. The debtor responds that claim preclusion based on a default  
15 judgment cannot be invoked to bar the litigation of dischargeability issues because the bankruptcy  
16 court has the exclusive jurisdiction to determine dischargeability.

## 18 DISCUSSION

### 19 A. Dismissal for Failure to State a Claim Is Inappropriate

20 For a defendant to prevail on a motion to dismiss under Rule 12(b)(6), it must appear beyond  
21 doubt that the plaintiff can prove no set of facts in support of the asserted claim which would entitle  
22 the plaintiff to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The purpose of a motion to  
23 dismiss under F.R.C.P. 12(b)(6) is to test the formal sufficiency of the statement of the claim for  
24 relief. It is not a procedure for resolving a contest about the merits of the case. 5A Wright & Miller,  
25 Federal Practice and Procedure § 1356 (West 1990). In reviewing the sufficiency of the complaint,  
26 the issue is not whether the plaintiff will ultimately prevail but whether the plaintiff is entitled to offer  
27 evidence to support the claims asserted. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). Such a  
28 motion is viewed with disfavor and should rarely be granted. Hall v. City of Santa Barbara, 833 F.2d

1 1270, 1274 (9th Cir. 1986), cert. denied, 485 U.S. 940 (1988). Only where the pleading under attack  
2 fails to meet the liberal requirement of Rule 8(a) for a short and plain statement of the claim showing  
3 that the pleader is entitled to relief would the pleading be subject to dismissal under Rule 12(b)(6).  
4 5A Wright & Miller, Federal Practice and Procedure § 1356 (West 1990).

5 The matters raised in the motion seeks disposition on the merits of the case, which the Court  
6 declines to do on the pleadings. Because the parties have raised the preclusion issue, the Court will  
7 address it later in this ruling. The complaint asserts that the plaintiff is entitled to a judgment of  
8 nondischargeability under section 523 based on fraud. The complaint, at a minimum, satisfies the  
9 notice pleading requirement of Rule 8(a), so dismissal under Rule 12(b)(6) would be inappropriate.

10  
11 **B. Leave to File A More Definite Statement Is Appropriate**

12 The complaint, however, is insufficient on its face based on the nature of the claim.  
13 Notwithstanding the general rule of notice pleading under F.R.C.P. 8(a), F.R.C.P. 9(b) requires that  
14 the circumstances surrounding an allegation of fraud be pled with particularity. A complaint must  
15 identify the circumstances constituting fraud so that the defendant can prepare an adequate answer  
16 from the allegations. Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1439 9th Cir. 1987).  
17 Statements regarding the time, place, and nature of the alleged fraudulent conduct are sufficient to  
18 satisfy Rule 9(b). Schreiber Distributing v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir.  
19 1986).

20 A complaint objecting to discharge must also state with particularity the underlying facts and  
21 the alleged wrong to ensure the broad policy of the federal rules to fairly apprise parties of the  
22 complaint against them in sufficient detail to allow them to adequately answer and prepare their  
23 defense. In re Jenkin, 83 Bankr. 733, 735 (BAP 9th Cir. 1988). A complaint that merely alleges that  
24 the debt is nondischargeable under the broad nondischargeability section of 11 U.S.C. § 523 without  
25 specifying the subsection or alleging specific facts is insufficient. In re Englander, 92 Bankr. 425, 427  
26 (BAP 9th Cir. 1988). The complaint before the Court both fails to specify the applicable subsection  
27 of section 523 and fails to allege specific facts constituting fraud. It is insufficient merely to  
28 incorporate by reference a copy of the Superior Court judgment. The opportunity to amend an

insufficient pleading is preferred over dismissal. Barnett v. Bailey, 956 F.2d 1036 (11th Cir. 1992). Therefore, the Court shall grant the defendant's motion for a more definite statement.

### C. Preclusion Principles Do Not Apply

Although the issue appears premature, the Court will address the propriety of preclusion principles to this proceeding because the parties argued the issue at length in their briefs. Neither res judicata nor collateral estoppel precludes this Court from hearing this proceeding because this court has exclusive jurisdiction over dischargeability, and the issues were not actually litigated.

To determine whether res judicata or collateral estoppel applies, a federal court applies the preclusion law of the state which issued the prior judgment. Kremer v. Chemical Construction Corp., 456 U.S. 461, 482 (1982). Under California law, res judicata and collateral estoppel apply only to judgments and orders that are final. Service Employees Int'l Union v. Hollywood Park, Inc., 197 Cal. Rptr. 316 (Cal. Ct. App. 1983).

#### 1. Applicability of Res Judicata to Dischargeability

Under California law, a default judgment is res judicata as to the issues tendered by the complaint, and the defendant is estopped from denying in a subsequent action any allegation contained in the former complaint. Ely v. Gray, 224 Cal. App. 3d 1257, 274 Cal. Rptr. 675 (Cal. Ct. App. 1990). But see In re Levy, 87 Bankr. 107 (Bankr. N.D. Cal. 1988)(res judicata does not preclude bankruptcy court from determining dischargeability where state court judgment was rendered by default). However, a prior state court judgment determining the amount of a debt is res judicata only as to the same claims in the bankruptcy court. Brown v. Felsen, 442 U.S. 127, 99 S.Ct. 2205 (1979)(in determining dischargeability, bankruptcy court is not confined to state court record reducing debt to judgment). The doctrine of res judicata does not apply to bar the bankruptcy court from looking beyond the state court judgment to determine whether a debt falls within an exception to discharge. Id.; In re Comer, 723 F.2d 737 (9th Cir. 1984). The bankruptcy court may consider all relevant evidence in making its determination as to the dischargeability of a debt and is not limited to consideration of the prior state court judgment. In re Waltrip, 139 Bankr. 492, 495 (N.D. Cal. 1991),

1 aff'd, 985 F.2d 574 (9th Cir. 1993)(state court finding that debtor is guilty of constructive fraud and  
2 breach of fiduciary duty does not preclude bankruptcy court from finding that debtor is not guilty of  
3 fiduciary defalcation and fraud involving bad faith and immorality). Rather, because of its exclusive  
4 jurisdiction, the bankruptcy court is required to make an independent decision of whether a debt is  
5 dischargeable. In re Bugna, 137 Bankr. 785 (Bankr. C.D. Cal. 1992).

## 2. Applicability of Collateral Estoppel to Dischargeability

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7  
8 Collateral estoppel does apply in dischargeability proceedings to those elements of a claim  
9 that are identical to the elements required for nondischargeability and which were actually litigated  
10 and determined in a prior action. Grogan v. Garner, 498 U.S. \_\_\_, 111 S.Ct. 654, 112 L.Ed.2d 755  
11 (1991). The issue arises as to how collateral estoppel is applied in a dischargeability action. Because  
12 the bankruptcy court has exclusive jurisdiction over dischargeability issues, the underlying record  
13 must be sufficient to permit the bankruptcy court to form an independent judgment regarding  
14 dischargeability. In re Daley, 776 F.2d 834 (9th Cir. 1985), cert. denied, 476 U.S. 1159 (1986); In re  
15 Bugna, 137 Bankr. 785. For collateral estoppel to apply, (1) the issue of fact or law must actually  
16 have been litigated and determined by a valid and final judgment, (2) the determination must be  
17 essential to the judgment, (3) the party against whom estoppel is asserted must have been a party to  
18 the judgment and (4) the issue to be precluded must be identical to the issue decided in the prior  
19 action. In re Bugna, 137 Bankr. at 789.

20 Because the underlying state court judgment is a default judgment, the state court made no  
21 findings on which this Court may rely. The issues have not been actually litigated, so an essential  
22 element for the applicability of collateral estoppel is absent.

## CONCLUSION

25 For the foregoing reasons, the defendant's motion to dismiss for failure to state a claim is  
26 denied; the defendant's motion for a more definite statement is granted, and the plaintiff is ordered to  
27 amend the complaint within 10 days of the entry of the court's order.

28 Good cause appearing, IT IS SO ORDERED.